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What's coming in 2023 in Blockchain?, China to launch NFT marketplace, US Ruling finds crypto-assets held by Celsius to be property of the company, US$3.5B of FTX funds beached in Bahamas, Golfers swing onto the blockchain with Play Today

Michael Bacina, Steven Pettigrove, Jake Huang, Luke Misthos and Lola Hickey of the Piper Alderman Blockchain Group bring you the latest legal, regulatory and project updates in Blockchain and Digital Law.

What's coming in 2023 in Blockchain?

A lot has changed in 12 months in Blockchain, with 2022 starting on highs and ending on some of the lowest lows that have been seen in the 14 years since the first genesis block on Bitcoin.

The spectacular human-led collapses of 2022 have given ammunition to crypto-critics and governments are more likely to focus on consumer / investor protection over innovation and jobs in 2023, with anecdotal evidence of Australian entrepreneurs leaving Australia for jurisdictions seeking to provide tech-enabling regulation as a greater focus. What are some of the key dates to look out for in 2033?

Stablecoins

2022 saw US$7.4T of stablecoin trading volumes, up from US$6T in 2021. These figures massively eclipsed the combined volumes of money transacted by credit card giants Mastercard (US$2.2T), American Express (US$1T) and Discover ($200B). Only Visa, with US$12T in volume came out ahead.

With US Congressman Pat Toomey continuing his years long effort to pass stablecoin regulation, and Australian and other regulators considering stablecoin regulation, the landscape of stablecoins is certain to change.

Central Bank Digital Currencies

The number of jurisdictions experimenting with CBDCs is continuing to grow. The Reserve Bank of Australia's CBDC Pilot runs in the first quarter of the year and should showcase a number of innovative uses for a digital Australian dollar. This may be the year that a retail CBDC starts to form in a western nation as a potential stablecoin challenger.

Enforcement

The trial of Sam Bankman-Fried, founder of Alameda Research and FTX, is currently set for 2 October 2023. While many believe he will reach a plea deal and not go to trial, all indications otherwise from Sam have been that he does not believe he committed fraud, but acknowledges poor business decisions. Recently the liquidators have announced that USD$7B of assets have been located, which may leave a customer shortage of around USD$3B (given FTX had ticked the "creditors between USD$1B and USD$10B box on the Chapter 11 form) – which may give some hope to creditors for an ultimate recovery, but that's unlikely to happen this year. Similarly, the prosecution of Alex Mashinsky of Celsius will also continue and that liquidation of Celsius will also be progressing.

Other enforcement actions have been increasing around the world in 2022 and we expect that trend to continue in 2023, particularly as legislations move slowly to regulate the cryptocurrency space. Regulation by enforcement is far from ideal, and risks a chilling effect as start-ups shy away from engaging with regulators for fear of being targeted. Yield products will continue to attract attention and it will be interesting to see if projects which try to fall under existing regulation are subject to higher scrutiny than their traditional competitors or if regulators will view crypto-asset projects using licensing as a positive development.

Regulation

In Australia, a long awaited token-mapping project should see the Treasury identify features of crypto-assets which move them outside of being mere property and into a regulatory perimeter.

Following on from that, CASSPr licensing is expected to become law this year which may cause consolidation in the exchange space for Australia as many exchanges face higher compliance costs. Other jurisdictions will likely move towards mandating custody for crypto-assets to help avoid further risk to customer assets.

NFTs

With sporting bodies and ticketing rapidly moving towards NFTs, we expect further integrations of the physical and digital world with collectible tickets and memorabilia becoming more established as non-fungible tokens and further efficiencies to arise as the foundational technology of blockchain moves into these businesses.

Ethereum

Following the Merge last year, staking withdrawals on Ethereum will be permitted, likely in March, which will represent the next step in the evolution of Ethereum, which already boasts one of the largest developer and user bases of any blockchain.

What’s Next?

What will be coming now that DeFi and NFTs have run up and settled down on Ethereum and the failures of 2023 have shown how the mistakes of the centralised world can still be repeated with a crypto flavour remains anyone’s guess, but in the fast moving world of crypto only one thing is certain, and that is change.

Golf has become the most recent sport to scratch the potential of blockchain technology with Play Today bringing a Web3 element to the real world. Co-founded by brothers Michael and Mark Dries, Play Today is bringing a sensible balance of the benefits of blockchain without requiring users to be super tech savvy in return.

China to launch NFT marketplace

Despite China’s ban on cryptocurrencies, China is continuing to explore the potential of digital assets with reports that a state-backed “Digital Asset Trading Platform” will be launched soon. The platform is expected to facilitate transactions of non-fungible tokens (NFTs, often called digital collectibles in China).

A launch ceremony was scheduled for 1 January in Beijing. The platform is developed and run by three entities, including China Technology Exchange (which is government backed), Art Exhibitions China (an official agency), and Huban Digital.

The markertplace will reportedly be built on the “China Cultural Protection Chain”, a platform designed to register, verify, deposit, track and protect digital assets and their intellectual properties.

According to China Daily, the platform will also integrate with other parties to provide users with valuable information, data and content in relation to the metaverse and digital collectibles.

NFTs (or digital collectibles) have a large user base in China, despite the country’s ban on traditional cryptocurrencies. In China, NFTs cannot be purchased with cryptocurrencies and are often traded on closed, highly regulated platforms as opposed to open ones.

The platform marks another attempt by China to actively harness the economic and technology benefits associated with blockchain and Web3 technologies. In the past year, among others, China:

- continued the roll-out of its central bank digital currency (the e-CNY);
- has been building a Blockchain-based Service Network for domestic and international companies; and
- the Shanghai government launched a $1.5 billion Metaverse Development Fund.

Earlier this month, a Chinese court ruled that digital assets have similar property rights to items sold on e-commerce sites, which was seen as a major milestone in their protection of NFTs as property in China.

A potentially significant ruling has been made in the Celsius Network's bankruptcy proceedings finding that customers do not own the tokens the subject of those proceedings. The ruling impacts about 600,000 accounts that held assets valued at US$4.2 billion when Celsius filed for Chapter 11 bankruptcy protection.

US Ruling finds crypto-assets held by Celsius to be property of the company

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The bankruptcy trustees had sought orders from the Court permitting the sale of stablecoins held by the company, and as part of that the published decision, the Court found that the assets held by the company were owned by the bankrupt company, and not customers themselves.

The Terms of Use were clear, saying:

> *you grant Celsius . . . all right and title to such Eligible Digital Assets, including ownership rights, and the right, without further notice to you, to hold such Digital Assets in Celsius' own Virtual Wallet or elsewhere, and to pledge, re-pledge, hypothecate, rehypothecate, sell, lend, or otherwise transfer or use any amount of such Digital Assets … in Celsius' full discretion.*

The trustees:

> *assert[ed] that ownership of the Earn Assets is an issue of contract interpretation and that the Terms of Use constituted a valid and enforceable contract between Celsius and its Account Holders*

A number of interested parties made objections and submissions, including over a dozen US states and Celsius customers (with petitions of hundreds of signatures submitted). Those objecting sought to attack the contract, raising various arguments including that:

- There were oral variations of the contract by Mr Mashinsky;
- The description of "loans" by customers meant that legal title to the crypto had not moved;
- That the contract lacked consideration;
- The transfer of assets was obtained via lengthy and confusing terms and conditions; and
- If a transfer of asset ownership had occurred, there would have been taxable events for customers.

The Court started from first principles which, under New York law, rendered the Terms of Use as a valid 'clickwrap' contract which 99% of the customers had consented to be bound by when they used the Celsius platform. The Court went on to find the Terms were "clear and unambiguous" and:

The Court finds that Account Holders understood that they were assenting to a contract governed by the Terms of Use even if the Account Holders chose to read some or none of the provisions

On the question of loans the Court said:

> *To read the Terms of Use such that "loan" overrides the unequivocal language transferring title and ownership of assets deposited into Earn Accounts to Celsius would be to read the Transfer of Title Clause out of the contract entirely. As the Committee notes, "it is a bedrock principle of contract interpretation that courts should not adopt an interpretation of a contract that has the effect of rendering at least one clause superfluous or meaningless, but rather, to the extent possible, should seek to read contractual provisions in harmony."*

And as a result the Court found there was a valid contract between Celsius customers and Celsius and that the contract terms unambiguously transferred all right and title of digital assets to Celsius. The Court specifically did not rule on any claims customers might make against the company or Mr Mashinsky relating to fraud, and the decision is not arising from a fully litigated hearing, so it should be kept in that context.

This decision is not likely to have any bearing on any FTX cases, as the FTX terms and conditions expressly did not transfer the ownership of customer assets. Many in the crypto world have been pressing for exchanges to show "proof of reserves" following the collapse of Celsius and FTX to give customers comfort that their assets are in fact held by the exchange.

The decision is interesting as it adds to the growing body of caselaw which recognizes that crypto-assets are both property, and are capable of being held and transferred as property, and to giving some guidance as to other insolvency situations which must deal with digital assets. It also serves as a reminder to users to read the terms and conditions they are agreeing to when putting money on the line.

US$3.5B of FTX funds beached in Bahamas

Over the holiday break the Bahamian government dropped a stunning press release revealing that, following the collapse of FTX on 11 November and a reported hack on 12 November, the Bahamian government took custody of crypto-assets valued at US$3.5B.

While most of the FTX group has been placed under Chapter 11 bankruptcy in the US, FTX Digital Markets Ltd was placed under a court-appointed joint provisional liquidation with a separate liquidator. The Chapter 11 bankruptcy trustee is seeking information about the digital wallets holding the assets and the Bahamian Supreme Court approved the co-operation of the Bahamian liquidators with the Chapter 11 trustee.

As part of the court application, an affidavit was filed confirming that FTX Digital Market's registration under the Digital Assets and Registered Exchanges Act 2020 (The DARE Act) was suspended on 10 November, with FTX Digital Markets placed into liquidation before the other global entities followed on 11 November.

The Bahamian Securities Commission has continued to reject suggestions that assets were withdrawn from FTX to prioritize Bahamian customers, and explained that the transfer of assets occurred because:

> *[b]ased on information provided by Sam Bankman-Fried to the Commission concerning the cyberattacks … the restricted access by the employees of FTX [Digital Markets] to its [Amazon Web Services] system, and other available information … there was a significant risk of imminent dissipation as to the digital assets under the custody or control of FTX … to the prejudice of its customers and creditors.*

A court order was then sought to safeguard the assets and on 12 November:

> *all digital assets of under the custody or control of FTXDM or its principals, valued at more than US$3.5 billion, based on market pricing at the time of transfer, to digital wallets controlled by the Commission, for safekeeping*

A sealing (or confidentiality) order was then made on 16 November. The assets are to be held to be delivered to the customers or creditors "who own them" or to the liquidator to be distributed under Bahamian insolvency law.

This disclosure may provide some hope to FTX customers who ultimately may see some kind of dividend or return of assets through the Bahamian insolvency process.

Golfers swing onto the blockchain with Play Today

The company has developed a digital scoring app linked to a crypto wallet which creates a permanent (and immutable) record of the user's scores, and encourages virtual competition. Users play a round of golf, score their round using the app in place of traditional scoring and submit that for their handicap while also minting a scorecard onto the blockchain using the digital wallet.

The company is also investing in NFTs and looking to build a virtual clubhouse metaverse for users that will involve exclusive events and features, with golf related tokens to be used to unlock metaverse experiences, participate in virtual leagues, buy and sell digital collectibles, and earn rewards.

With the ongoing success of the AO Art Ball NFT project, Play Today looks to take blockchain interaction a step further and shake up the traditional paper and pencil scoring system used by golfers, which suffered greatly with social distancing over covid.

Using the Flow Blockchain, the same blockchain that runs NBA Top Shot, Play Today is anticipating over 100,000 mobile users by the end of 2023, out of an estimated 60M golfers globally.

Offerings which provide a sound user experience and bring the benefits of immutable, and hopefully transferable and accessible scoring, are poised to unlock the sports market for players of all kinds as blockchain continues to spread into the backend of our lives.